No. 16-1466

In the Supreme Court of the United States

MARK JANUS,

Petitioner,

–v–

AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PROFESSOR BENJAMIN I. SACHS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

Professor Benjamin I. Sachs is the Kestnbaum Professor of Labor and Industry at Harvard Law School and is a leading expert in the field of labor law and labor relations. He is the author of an article entitled *Agency Fees and the First Amendment*, 131 Harv. L. Rev. (forthcoming 2018).

SUMMARY OF ARGUMENT

Mandatory agency fees are compatible with the First Amendment because they do not constitute the compelled subsidization of union speech by non-union members. As this Court's precedents instruct, "pass-through" payments from employers through employees to a union should not be attributed to the employees if they had no "genuine choice" over the fact or amount of payments. Because the employer controlled the amount of agency fees paid to the union and required its employees to transmit funds received from the employer to the union, these payments are instead attributed to the employer. As these payments do not

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk of this Court. Counsel for *amicus curiae* certify that no counsel for any party authored this brief in whole or in part and no person or entity aside from *amicus curiae* and counsel made a monetary contribution to the preparation or submission of this brief.

constitute employee speech under the First Amendment, Petitioner Mark Janus does not raise a constitutional challenge to his obligation to pay agency fees.

ARGUMENT

The First Amendment bans governmental action that compels employees to subsidize speech with which they disagree. But the First Amendment does not ban "pass-through" payments, where an originator of the funds transmits them through an intermediary to a final recipient. This Court's First Amendment jurisprudence—arising from decisions addressing government-funded tuition programs—instructs that pass-through payments should be attributed to the entity with the choice over where the funds are directed. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). In *Zelman*, the government paid tuition subsidies to parents but, because the parents were permitted to choose where they spent those subsidies, payment of the subsidies was tied to the parents for First Amendment purposes. *See id.* at 649, 653-54.

Here, the employees receive funds from their employer that must be used for agency fees and have no choice over whether, to whom, or how much to pay in agency fees; the record is clear that the challenged agency fees are paid by employers to their employees solely for the purpose of transmitting those fees to the union. *See* Ill. Public Labor Relations Act (IPLRA), 5 Ill. Comp. Stat. 315/6(a), 315/10(a) (2017). Therefore, these fees cannot be attributed to the employees, and their payment cannot constitute compulsory speech under

this Court's First Amendment jurisprudence. Petitioner Mark Janus's constitutional challenge should therefore be rejected.[2]

I. THE FIRST AMENDMENT AND THE PRINCIPLE OF CHOICE

The question before the Court, whether pass-through payments such as agency fees should be attributed to the intermediary or the government originator when determining their compatibility with the First Amendment, has been addressed in a series of cases involving government-funded school tuition programs. *See generally Zelman*, 536 U.S. 639; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). In each of these cases, the Court concluded that the entity who had a genuine choice over where the payment was directed was responsible for the payment for constitutional purposes; the entity without a genuine choice in the pass-through transaction could not be held constitutionally responsible for the subsidy. *See, e.g.*, *Zelman*, 536 U.S. at 652.

Zelman, the most recent of these cases, involved an Ohio program "designed to provide educational choices to families with children who reside in the

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[2] This brief proceeds on the assumption—dictated by *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—that compelled subsidization of speech can raise constitutional concerns in certain contexts. But this brief takes no position on whether *Abood*'s interpretation of the First Amendment is in fact correct. It also takes no position on the more particular point that protections for religious liberty imply that compelled subsidization of speech is a First Amendment problem.

Cleveland City School District." 536 U.S. at 643-44. Under the relevant portion of the program, students received tuition aid from the state "to attend a participating public or private school of their parent's choosing." *Id.* at 645. The state sent checks for tuition funds made payable to the participating parents, who then endorsed the checks over to the school of their choice. Eligible schools included secular private schools, religious private schools, and public schools outside the student's geographic district, although the vast majority of participating schools were religiously affiliated. *Id.* State taxpayers challenged these pass-through payments as unconstitutional state funding of religion in violation of the First Amendment. *Id.* at 648.

This Court determined that the constitutional validity of the program turned on whether the tuition payments made to religious schools should be attributed to the government—in which case the payments would constitute a violation of the Establishment Clause—or to the participating parents—a result that would be constitutionally permissible. *See id.* at 649. The critical factor, the Court determined, was whether the intermediary had a "genuine and independent private choice" over where the payment would be directed. *Id.* at 652. If the parents did not have a genuine choice over where to send their child—if, for example, the government mandated that all funds be spent at a certain religious school—then the funds would be considered "direct aid to religious schools" by the government. *Id.* at 649, 653, 655, 662; *see also Mitchell v. Helms*, 530 U.S. 793, 842 (2000) (O'Connor, J., concurring) (explaining that, without choice, the money must be treated as "a government program of direct aid to religious schools," regardless of whether the funds pass through parents'

hands en route to the school); Br. of *Amicus Curiae* American Center for Law and Justice in Supp. of Pet'r (ACLJ Br.) 9 (explaining that "[t]he point of the [genuine choice] 'circuit breaking' concept is . . . to identify the actor who chooses where the money goes" (emphasis omitted)). The critical question, therefore, was not whether the payments passed through parents' hands, but who chose where those funds were spent. *See Zelman*, 536 U.S. at 649.

Because the Court concluded that the parents retained a genuine choice about where to send their child and thus where to spend the tuition funds they received, the "circuit between government and religion" was broken. *Id.* at 652, 662. Therefore, the payments were treated as coming from the parents, consistent with the Establishment Clause. *Id.*

Zelman's focus on "genuine choice" in determining to whom government payments should be attributed follows a line of consistent and long-standing authority. *Zobrest v. Catalina Foothills School District*, for example, involved a federal program that funded sign-language interpreters for deaf students in religious schools. 509 U.S. at 10. The Court rejected an Establishment Clause challenge to the program because, "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* Therefore, the Court concluded that "the circuit between government and religion was broken, and the Establishment Clause was not implicated." *Zelman*, 536 U.S. at 652 (discussing *Zobrest*).

Witters v. Washington Department of Services for the Blind involved a vocational scholarship program that provided tuition aid to a blind student who chose to use the funds for instruction as a pastor at a Christian college. 474 U.S. at 482-83. The Court rejected the Establishment Clause challenge to this program because "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488.

Mueller v. Allen, the foundational case in this line of authority, emphasized the principle of private choice in rejecting an Establishment Clause challenge to a Minnesota program that authorized tax deductions for a variety of educational expenses, including tuition for private religious schools. 463 U.S. at 397, 399-400. The Court found dispositive that the funds reaching religious schools were the "result of numerous, private choices of individual parents," ensuring against any "imprimatur of state approval" on the spending. *Id.* at 399 (internal citation and quotation marks omitted).

Similar principles for determining to whom to attribute speech have animated other free-speech decisions issued by this Court as well. *See, e.g., Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 563-64 (2005) (finding a lack of evidence that mandatory contributions to a governmental program supporting the beef industry could be attributed to beef producers, instead attributing the speech to the government itself and rejecting the producers' First Amendment challenge).[3]

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[3] The use of the genuine choice principle to determine to whom to attribute monetary speech also exists in bankruptcy through the "earmarking doctrine." Under this doctrine, funds are not

This Court's jurisprudence thus instructs that where the choice resides with the intermediary, the payment should be attributed to the intermediary. *See Zelman*, 536 U.S. at 649-53; *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 487-89; *Mueller*, 463 U.S. at 399-400. But where that choice does not reside with the intermediary, the funds cannot be attributed to that intermediary. *See Zelman*, 536 U.S. at 652. These authorities lead to the conclusion that a constitutionally permissible "pass-through payment" occurs for free speech purposes where the originator, not the intermediary, exercises "genuine choice" over the final recipient of the funds. *Id.* at 649-53.

II. AGENCY FEES ARE NOT COMPELLED SPEECH OF THE EMPLOYEE BECAUSE THE EMPLOYEE HAS NO GENUINE CHOICE IN THE FEES

The determination of who exercises "genuine choice" over the final recipient of the agency fees resolves the issue of to whom to attribute the agency

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attributed to an intermediary debtor—even though they pass through the debtor's account—because the debtor is deemed not to have control over those funds. *See, e.g., In re Flanagan*, 503 F.3d 171, 185 (2d Cir. 2007) (finding irrelevant that the debtor "temporarily had possession" of the funds because "he never obtained control of the funds in the sense of being able to control how they were ultimately distributed"); *In re Calvert*, 227 B.R. 153, 157 (B.A.P. 8th Cir. 1998) (explaining that funds subject to the earmarking doctrine "never become part of the debtor's property"); *see also* Wes Turner, *Agency Fees and the Earmarking Doctrine*, On Labor, Jan. 16, 2018, https://onlabor.org/agency-fees-and-the-earmarking-doctrine/ (describing the earmarking doctrine and comparing it to the agency fees at issue in this case).

fees when considering their compatibility with the First Amendment.[4]

A. Agency Fees Cannot Be Attributed to Employees Because Employees Have No Choice in the Fees

The modern agency fee structure was established by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, and similar state statutes. While these statutes prohibit direct payments from employers to unions, they permit employers to mandate that a designated fee paid to employees be directed ultimately to a union. *See, e.g.*, NLRA, 29 U.S.C. § 158(a)(2) ("It shall be an unfair labor practice for an employer . . . to . . . contribute financial or other support to [a union]"); *id.* § 158(a)(3) ("nothing . . . shall preclude an employer from making an agreement with a labor organization" through which employees are required "as a condition of employment" "to tender [to the union] the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership"); *id.* § 186(a) (making it "unlawful for any employer . . . to pay, lend, or deliver, or agree to pay,

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[4] Although it initially arose under the Establishment Clause, the genuine choice test should apply equally to the Free Speech and Association Clauses at issue in this case, as all of these clauses share an animating concern: preventing government compulsion of private individuals' support of institutions and ideas they would not choose freely to support—*i.e.*, the "liberty of conscience." Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 350 (2002) (noting that concerns with the "liberty of conscience" are at the heart of the Establishment Clause); *see also* Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 Harv. L. Rev. 1397, 1407 (2003) (using the agency fee example to explain the connection between the Establishment Clause and compelled speech cases).

lend, or deliver, any money . . . to any labor organization").

Illinois's statutory scheme, at issue in this case, similarly provides that it is "an unfair labor practice for an employer . . . [to] contribute financial or other support to [any labor organization]." IPLRA, 5 Ill. Comp. Stat. 315/10(a). Instead, "[e]mployees may be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment . . . ." *Id.* at 315/6(a), (e).[5]

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[5] Other states' labor laws have similar provisions. *See, e.g., Me. Emps. United/SACO Public Works Ass'n/SACO Workers All. v. City of SACO*, No. 11-02, 2011 WL 6965924, at *5-6 (Me. Lab. Rel. Bd. Mar. 29, 2011) (discussing Maine's automatic check-off provisions, a system akin to Illinois's); N.J. Stat. Ann. 34:13A-5.5(a) (West 2017) (permitting the state to "order the public employer to institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the employees . . . who are not members of the majority representative"); Mass. Gen. Laws ch. 150A, § 4 (2017) (making it an "unfair labor practice" for an employer to "contribute financial or other support to" "any labor organization"); Mass. Gen. Laws ch. 149, § 20D (2017) (making it illegal for any employer to "pay or deliver . . . to any group or committee of employees . . . any money or other thing of value"); Cal. Gov't Code § 3506.5 (West 2017) (instructing that a public agency "shall not . . . contribute financial or other support to any employee organization"); *see also* Mich. Comp. Laws § 423.210 (2017); N.Y. Civ. Serv. Law § 209-a (McKinney 2017); N.Y. Lab. Law § 704 (McKinney 2017); Conn. Gen. Stat. § 53a-158 (2017); Conn. Gen. Stat. § 31-105 (2017); Wash. Rev. Code § 49.44.020 (2017); Colo. Rev. Stat. § 8-3-108 (2017); Haw. Rev. Stat. § 377-6 (2017); Or. Rev. Stat. § 663.125 (2017); 43 Pa. Cons. Stat. § 211.6 (2017); Vt. Stat. Ann. tit. 21, § 1621 (2017).

These statutory schemes create pass-through systems, whereby payments originating from a government employer pass through government employees and are ultimately received by a union. Specifically, in addition to their wages, an employer pays its employees an amount equal to the agency fee, which, under the laws in Illinois and several other states, is automatically transmitted to the union. The employees have no choice over whether the funds are paid to the union or the amount of the funds paid. Instead, the money paid as agency fees generally appears as wages on the income side of an employee's paycheck and as a mandatory payment on the expense side of the paycheck, known as a "check-off."

This is particularly true of Illinois's system, where the state automatically deducts the agency fee from non-union members' wages. *See id.* (permitting automatic deductions of only the "chargeable expenses," *i.e.*, those expenses related to collective bargaining to benefit the employee). Although agency fees are paid to employees, they are diverted to the union instead of being deposited in the employee's bank account. *See id.* at 315/6(e) ("the proportionate share payment . . . shall be deducted by the employer from earnings of the nonmember employees and paid to the employee organization"). Therefore, the State of Illinois, not its employees, exercises the genuine choice to transmit the agency fees ultimately to the union and the "circuit" between the employer and the union remains unbroken. *See Zelman*, 536 U.S. at 652.

Under this statutory scheme, the fees at issue in this case thus constitute a payment attributed to the

employer under the First Amendment. Even the Petitioner concedes that, "'[a]t bottom, the use of the state payroll system to collect union dues is a *state* subsidy of speech.'" *See* Pet'r's Br. 42 (quoting *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013); emphasis added). Therefore, the employee's transmission of these agency fees does not constitute compelled speech by the employee under this Court's genuine choice doctrine.

That the agency fees are called "wages" when they pass through the employee's paycheck does not alter their treatment under the First Amendment.[6] *See* ACLJ Br. 4-6. The manner in which the payments are directed and the ultimate recipient of the payments, rather than the name ascribed to them, must govern assessment of their compatibility with the Constitution. *See, e.g., Zelman*, 536 U.S. at 649, 653-54. Indeed, nomenclature used to refer to the payments in *Zelman* and its predecessors did not affect their treatment under the First Amendment. *See, e.g., id.* at 645, 649, 653-54. A formalistic approach of the sort called for by Petitioner and his *amici* would have permitted the government in *Zelman* to avoid constitutional scrutiny simply by using the label "parents' tuition funds," even if the fund were directed to particular religious schools, an outcome all agree would have been constitutionally infirm.

Differences in the treatment of these pass-through payments under the First Amendment and

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[6] Notably, full agency fees, union dues, and initiation fees are tax-deductible. *See, e.g.*, IRS Form 1040 Schedule A, available at https://www.irs.gov/pub/irs-pdf/f1040sa.pdf (last visited Jan. 4, 2018).

the NLRA are fully consistent with the different governmental interests at issue and do not undermine the constitutionality of agency fees. This is true in other contexts, as well. In *National Federation of Independent Business v. Sebelius*, for example, the Court concluded that the health care mandate in the Affordable Care Act qualified as a tax under the Constitution, even though Congress did not regard it as a tax. 567 U.S. 519, 563-74 (2012).

Under *Zelman* and its progeny, the agency fees at issue in this case should be attributed to the governmental employer who originated the fees, and this Court should conclude that employees have not been compelled to subsidize speech with which they disagree in violation of the First Amendment.

B. The ACLJ's Examples Do Not Involve Pass-Through Payments and Are Inapposite to the Agency Fee Context

None of the mandatory payments to which the American Center for Law and Justice (ACLJ) refers—such as airline baggage fees, hotel cancellation fees, and extortion, *see* ACLJ Br. 6, 8[7]—are analogous to agency fees because they do not involve pass-through

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[7] Garnishment of wages, *i.e.*, for child support or pursuant to other court orders, *see, e.g.*, ALCJ Br. 7, 8, does not raise a First Amendment issue, at least in the context presented by *amici*. That the wages may be the employee's property for due-process purposes is a separate consideration from whether compliance with that garnishment violates the First Amendment, and *amici* have failed to present any argument on the latter point. However, under the genuine choice test, these payments would be constitutionally acceptable because the choice of recipient was made by an individual other than the intermediary garnishee.

payments. For example, airline and hotel fees are paid directly from the consumer to the airline or the hotel. In each, there is no intermediary through which the funds pass, and there is no other actor in these transactions.

The same is true of the cases cited by the ACLJ. This Court's recent decision in *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011), did not address pass-through payments at all.[8] *Winn* instead involved a challenge by Arizona state taxpayers to tax credits received by other taxpayers as contributions to student tuition organizations, many of which were religiously affiliated. *Id.* at 129, 130-31. Although this case does not speak to the constitutionality of pass-through payments, it nonetheless accords with the genuine choice principle: participating in a program that offers a tax credit is the choice of the individual taxpayer and therefore is properly attributed to him or her, while an expenditure of tax funds is a choice made by the government and attributable to it. *Id.* at 142-44. In *Winn*, there was no Establishment Clause issue because the tax credits were attributed to individual taxpayers who were entrusted with the genuine choice about how to spend their own funds. *Id.* at 144. *Wooley v. Maynard*, another case cited by the ALCJ, did not involve the hallmark pass-through structure of an originator and an intermediary, but instead involved only an originator and a recipient. 430 U.S. 705, 706-07 (1977).

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[8] *Winn* focused instead on the taxpayers' standing—ultimately finding that they had none—rather than on the constitutional status of the tax program. 563 U.S. at 130, 133-46. For this reason, the case is further irrelevant to the issues before this Court.

Because the payments on which the ACLJ relies are not pass-through transactions, they are inapposite in determining the constitutionality of payments that pass from an employer through an employee to a third-party union.

CONCLUSION

The agency fees at issue here are compatible with the First Amendment and, therefore, the challenge to their lawfulness should be rejected.

Respectfully submitted,

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